Harrison Ready Mix Concrete and Supply Company, Inc. *and* International Brotherhood of Firemen and Oilers, Local 320, AFL–CIO. Cases 9–CA–30093, 9–CA–30227, 9–CA–30259, and 9–CA–30410

February 7, 1995

DECISION AND ORDER

BY MEMBERS BROWNING, COHEN, AND TRUESDALE

On April 12, 1994, Administrative Law Judge Donald R. Holley issued the attached decision. The General Counsel filed exceptions and a supporting brief and the Respondent filed a response to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions except as modified below and to adopt the recommended Order as modified and set forth in full below.

The facts are undisputed. The Respondent makes and sells concrete. On November 4, 1991, the Union was certified to represent a unit of the Respondent's truck drivers, vehicle maintenance employees, and batch plant employees.[1] In January 1992, the parties commenced negotiations for a first contract. The parties bargained through 1992 and reached final agreement in July 1993.

In July 1989, the Respondent adopted a policy of giving the unit employees an annual wage increase.[2] This increase had two components—a fixed across-the-board percentage and an additional merit percentage. The Respondent determined the fixed across-the-board percentage of the wage increase by assessing cost-of-living indexes, the Respondent's current profitability and financial projections, and wage increases given by other similar enterprises in the industry. In 1989 and 1990, the across-the-board percentage was 3 percent, in 1991 it was 4 percent. The record also shows that the merit percentage increases ranged from 0 to 2 percent for each of these 3 years depending on the individual employee's evaluation. Some employees received the full 2 percent, some employees received nothing, and some received amounts varying between 0 and 2 percent. Thus in July 1989 and 1990, the Respondent's employees received at least a 3-percent wage increase with many employees receiving varying amounts between 3 and 5 percent. In July 1991, the Respondent's employees received at least a 4-percent wage increase with many employees receiving varying amounts between 4 and 6 percent.

David Gumz, the Respondent's plant manager, testified that all the employees asked him about the 1992 wage increase. He also testified that he told employees that wages were frozen because of the negotiations with the Union. He further testified that Clarence Roudebush, the Respondent's owner, and James Griebel, the Respondent's vice president of operation, told him to tell the employees this. These exchanges occurred in July 1992. Mike Moses, the Union's business representative, testified that when he became aware during negotiations that the Respondent was evaluating employees, he asked the Respondent if it was going to continue the practice of giving the pay raises. The Respondent told Moses that the negotiations would take care of the issue. This exchange occurred in August or September 1992. The Respondent gave no wage increase to employees in 1992.

The judge dismissed the allegation that the discontinuance of the annual wage increase violated Section 8(a)(5). He noted that the Union's initial wage proposal did not request that the discretionary increases be continued and reasoned that the Respondent would have violated the Act if it had continued the increases. The General Counsel excepts.

We recently reaffirmed the proposition that an employer that has a practice of granting merit raises that are fixed as to timing but discretionary in amount may not discontinue that practice without bargaining to agreement or impasse with the union. See *Daily News of Los Angeles*, 315 NLRB 1236 (1994). Here the Respondent had a 3-year practice of granting a July pay raise to employees pursuant to its across-the-board and evaluation-merit formula. The Union tried to initiate bargaining with the Respondent about the July 1992 increase but the Respondent did not bargain about the increase. The Respondent, nonetheless, discontinued the practice of the July pay raise during the 1992 negotiations.

Accordingly, for the reasons stated in *Daily News of Los Angeles*, supra, we find that the Respondent's discontinuance of its customary wage increases in July 1992 without bargaining to agreement or impasse with the Union violated Section 8(a)(5) and (1) of the Act. Further, since the unilateral discontinuance of the increase violated the Act, the Respondent's statements to employees in July 1992 that wages were frozen because of negotiations with the Union violated Section 8(a)(1) of the Act.

[1] The unit is described as: All truckdrivers, vehicle maintenance employees, and batch plant employees employed by (Respondent) at its Harrison, Ohio facility, excluding all office clerical employees and professional employees, guards, and supervisors as defined in the Act.

[2] The Respondent gave no wage increases in 1986, 1987, and 1988 because of its poor financial condition.

ORDER

The National Labor Relations Board orders that the Respondent, Harrison Ready Mix Concrete and Supply Company, Inc., Harrison, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with International Brotherhood of Firemen and Oilers, Local 320, AFL–CIO as the exclusive bargaining representative of all truckdrivers, vehicle maintenance employees, and batch employees employed by Respondent at its Harrison, Ohio facility, excluding all office clerical employees and professional employees, guards, and supervisors as defined in the Act.

(b) Unilaterally withholding annual wage increases from employees in the appropriate unit.

(c) Unilaterally increasing its employees' wages in amounts not offered to the Union during negotiations at a time when the parties are not at impasse in their negotiations and refusing to negotiate with the Union during times when no impasse in negotiations exists.

(d) Informing employees that wages are frozen because of negotiations with the Union with reference to the July 1992 wage increase.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, reinstate the wages and terms and conditions of employment that existed before the unilateral changes. However, no provision of this Order shall in any way be construed as requiring Respondent to revoke unilaterally implemented improvements in terms and conditions of employment of unit employees.

(b) Make whole the employees in the appropriate unit for any monetary losses they may have suffered by reason of the Respondent's unilateral withholding of annual wage increases that the employees would have received. The amount shall be computed on a quarterly basis in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Harrison, Ohio facility copies of the attached notice marked ''Appendix.''[3] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with International Brotherhood of Firemen and Oilers, Local 320, AFL–CIO as the exclusive bargaining representative of all truckdrivers, vehicle maintenance employees, and batch employees employed by us at our Harrison, Ohio facility, excluding all office clerical employees and professional employees, guards, and supervisors as defined in the Act.

WE WILL NOT unilaterally withhold any wage increases from you to which you may have been entitled.

WE WILL NOT unilaterally increase our employees' wages in amounts not offered to the Union during negotiations at a time when we are not at impasse in our negotiations, and WE WILL NOT refuse to negotiate with the Union during times when no impasse in negotiations exists.

WE WILL NOT inform employees that wages are frozen because of negotiations with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed by Section 7 of the Act.

WE WILL, on request, reinstate the wages and terms and conditions of employment which existed before the unlawful unilateral changes. However, we are not required to revoke unilaterally implemented improvements in terms and conditions of employment of unit employees.

WE WILL make whole the employees in the unit described for any monetary losses they may have suf-

fered by reason of our unilateral withholding of the annual wage increases they would have received.

HARRISON READY MIX CONCRETE AND SUPPLY COMPANY, INC.

Eric A. Taylor, Esq., for the General Counsel.
J. Michael Fischer, Esq. (Ennis, Roberts & Fischer), of Cincinnati, Ohio, for the Respondent.
Don C. Meade, Esq. (Miller & Meade, P.S.C.), for the Charging Party.

DECISION

STATEMENT OF THE CASE

DONALD R. HOLLEY, Administrative Law Judge. Upon an original charge filed by the above Union in Case 9–CA–30093 on October 26, 1992,[1] amended on November 18, the Regional Director for Region 9 of the National Labor Relations Board issued a complaint on November 23 which alleges that Harrison Ready Mix Concrete and Supply Company, Inc. (the Respondent) engaged in conduct which violates Section 8(a)(1) and (5) of the National Labor Relations Act. Respondent filed timely answer denying that it violated the Act as alleged. Thereafter, upon an original charge filed in Case 9–CA–30227 on December 11, amended on December 23, and an original charge filed in Case 9–CA–30259 on December 21, amended on January 27, 1993, the Region issued a second complaint on January 29, 1993, which realleged the matter set forth in the earlier complaint, alleged additional violations of Section 8(a)(1), (3), and (5) of the Act and consolidated Cases 9–CA–30227 and 9–CA–30259 with 9–CA–30093 for trial. Respondent filed timely answer denying it had engaged in the unfair labor practices alleged in the second complaint. On February 8, 1993, the Region issued an amended complaint which realleged the matter set forth in the January 29, 1993 complaint and added a conclusionary paragraph which alleged that, by engaging in specified conduct, Respondent independently violated Section 8(a)(1) of the Act. Respondent filed timely answer to the February 8, 1993 amended complaint denying it had engaged in the unfair labor practices alleged therein. On February 17, 1993, the Union filed the charge in Case 9–CA–30410, and on April 1, 1993, the Region issued an order consolidating Case 9–CA–30410 with Cases 9–CA–30093, 9–CA–30227, and 9–CA–30259 for trial, and it issued a second amended complaint which realleged the matter set forth in the February 8, 1993 complaint, and alleged that by discharging employee Charles Whaley because he engaged in union and/or concerted activities, Respondent violated Section 8(a)(3) of the Act. Respondent filed timely answer denying it had engaged in the unfair labor practices alleged in the complaint.

The case was heard in Cincinnati, Ohio, on September 30 and October 1, 1993. All parties appeared and were afforded full opportunity to participate. Upon the entire record, including consideration of posthearing briefs filed by the parties, and from my observation of the demeanor of the witnesses who appeared to give testimony, I make the following

[1] All dates herein are 1992 unless otherwise indicated.

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, has been engaged in the manufacture and sale of concrete at its Harrison, Ohio facility at all times material. During the 12-month period preceding issuance of the original complaint on November 23, 1992, it sold and shipped from its Harrison, Ohio facility goods valued in excess of $50,000 directly to points outside the State of Ohio. It is admitted, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. STATUS OF LABOR ORGANIZATION

It is admitted, and I find, that International Brotherhood of Firemen and Oilers, Local 320, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Respondent is engaged in the business of manufacturing and selling concrete at its Harrison, Ohio facility. It is a family-owned business and at present is owned by Clarence (Bud) Roudebush and his wife, Peggy A. Roudebush. Clarence Roudebush is president of the corporation and Peggy Roudebush is vice president and general manager. Other management personnel involved in the instant proceeding are: James Griebel, vice president of operation; David Gumz, plant manager; James Weitz, residential sales director; and James Wheeler, garage and safety department supervision.[2]

For some unstated period prior to 1983, Respondent's employees were represented by the Teamsters. A strike in 1983 resulted in the Teamsters ceasing to represent Respondent's employees and they remained unrepresented until the Union was certified as the exclusive bargaining representative of employees in the following unit, admitted to constitute an appropriate unit for bargaining, on November 4, 1991.

> All truck drivers, vehicle maintenance employees and batch plant employees employed by (Respondent) at its Harrison, Ohio facility, excluding all office clerical employees and professional employees, guards and supervisors as defined in the Act.

The record reveals that the Union and Respondent commenced negotiations for a first contract in January 1992. The Union was represented in negotiations by: Mike Moses, its business representative; Dennis Jackson, a committee person; and employee Charles Whaley. Management was represented by: Michael Fischer, Respondent's attorney; Clarence (Bud) Roudebush, Respondent's president; and James Wheeler, Respondent's garage and safety department supervisor. During calendar year 1992, the parties held approximately 16 bargaining sessions. They eventually reached agreement on a contract in mid-1993.

[2] Respondent admits the named individuals, with exception of James Weitz, are statutory supervisors and are agents of Respondent within the meaning of Sec. 2(13) of the Act. As the record reveals Weitz hired drivers, I find him to be a supervisor within the meaning of Sec. 2(11) of the Act.

Union spokesman, Moses, indicated during his testimony that the parties, by mutual agreement, treated noneconomic matters first during their negotiations. He explained that as agreement was reached on an issue, the practice followed was one in which the agreement was reduced to writing and he and Fischer would sign off on the document. Through Moses' testimony, General Counsel placed in evidence as General Counsel's Exhibit 7 documents which Moses and Fischer signed off on during the 1992 negotiations. Subjects signed off on included: no discrimination, promotions and transfers, grievance procedure, vacations, seniority, discipline, sick days, recognition, hours of work and overtime, no strike or lockout, company rules and regulations, management rights, payday, layoff and recall, leave of absence, continuance clause, holidays, funeral leave, union rights, scope and purpose of contract, safety and health, and jury duty.

While negotiations apparently proceeded smoothly until midsummer 1992, the complaint in its final form alleges, and General Counsel contends, that Respondent engaged in conduct which violates Section 8(a)(1), (3), and (5) of the Act during the latter half of 1992.

B. *The Alleged 8(a)(1) Violations*

The issues posed by the pleadings are:

1. Whether Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally discontinuing annual wage increases.
2. Whether Respondent violated Section 8(a)(1) of the Act by informing employees annual wage increases were being withheld ''because of negotiations'' and/or because they were ''frozen as a result of the Union.''
3. Whether Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally implementing a wage increase on January 3, 1993.
4. Whether Respondent violated Section 8(a)(1) and (5) of the Act by ceasing and refusing to bargain with the Union prior to a good-faith impasse in negotiations.
5. Whether Respondent violated Section 8(a)(1), (3), and (5) of the Act by unilaterally changing its referral bonus policy for the purpose of depriving known union adherents Charles Whaley and Clifford Fulmer of the bonus.
6. Whether Respondent violated Section 8(a)(1) and (3) of the Act by suspending and discharging employee Charles Whaley because of his support for and activities on behalf of the Union.

C. *The Annual Wage Increases*

Peggy Roudebush testified that she came with the Company in 1985, and it was in poor financial condition at that time. She indicated employees received no wage increases in 1986, 1987, or 1988 because Respondent was financially unable to give any increases. In 1989, the Company adopted what she described to be a pay for performance increase system which provided for a combination of across-the-board and merit increases. Under the policy, Respondent selected a percentage increase which all employees would receive. The across-the-board percentage increase was selected on the basis of such factors as cost of living indexes, Respondent's profitability and financial projections, and increases that were being granted in the industry. An employee could also receive up to an additional 2-percent increase depending on the employee's performance as determined by the employee's evaluation. Some employees received the full 2-percent merit increase, some received no additional increase and the rest of the employees received additional merit increases of between 0 and 2 percent. She recalled the minimum base raise in 1989 was 3 percent, in 1990 it was 3 percent, and in 1991 it was 4 percent. She indicated the amount which could be received in the form of incentive raise in each of the 3 years was 2 percent, i.e., a maximum of 5 percent in 1989, a maximum of 5 percent in 1990, and a maximum of 6 percent in 1991. The raises were conferred effective July 1 each year.

Peggy Roudebush testified there was discussion concerning giving a raise in July 1992, but none was given because legal counsel advised that giving one could be construed as an unfair labor practice.

The Union's spokesman in negotiations, Moses, testified that after the Union became aware that evaluations of some employees had been completed in August or September 1992, he asked Respondent's representatives if Respondent intended to continue the practice of giving annual wage increase after the employee evaluations were completed. The reply was that they would be in negotiations over wages soon and the negotiations will take care of that process.

General Counsel contends that Respondent violated Section 8(a)(1) and (5) of the Act when it failed to give employees their annual wage increase in July 1992 because the annual increase had become a term or condition of employment and Respondent could not unilaterally alter the terms and conditions of employment of employees during negotiations without the permission and consent of their collective-bargaining agent. Respondent contends that it necessarily exercised discretion when determining the base rate and the portion of increase given because of performance or merit, and it submits that the Act makes unlawful the granting of discretionary raises after employees obtain union representation.

In early January 1992, the Union presented Respondent with its initial contract proposal by giving it a whole contract. Union spokesman, Moses, indicated that a document placed in evidence as Respondent's Exhibit 1 was the wage proposal presented in the Union's original contract. Summarized, that proposal proposed specified hourly wage rates for all persons working in batch plant, driver, and vehicle maintenance positions except for the batch plant weigh master and dispatcher. Weekly salaries were proposed for persons in the last named job classifications (R. Exh. 1). Respondent responded to the Union's initial contract proposal on January 10, 1992, indicating at the time that it was not addressing salary and fringe benefits as it assumed noneconomic issues would be handled first (R. Exh. 2). Moses signified the Union agreed to proceed with negotiations in that manner.[3]

There are two lines of cases which treat the subject of the granting or withholding of discretionary increases during that period when parties are negotiating an initial contract. One line, typified by *Central Maine Morning Sentinel*, 295 NLRB 376 (1989), is to the effect that if a Respondent had an established practice of granting its employees an annual wage increase, they can reasonably expect, after they have selected union representation, that the wage increase would continue to be a part of their ongoing conditions of employment, at least until an initial collective-bargaining agreement was in place to establish a wage scale independent of Respondent's

[3] Respondent presented its first wage proposal on July 29, 1992. See R. Exh. 3.

past practice, or until the parties had bargained to impasse about changing their conditions. The second line of cases is illustrated by *American Mirror Co.*, 269 NLRB 1091, 1094–1095 (1984). There, the situation was described by Administrative Law Judge Russell King to be as follows (at 1094):

> The Union was certified on July 6. Contract bargaining commenced in late July. Throughout the negotiations the topic of the previous or so-called ''customary'' increases came up. The Union's position remained the same, and the Union requested that raises be granted notwithstanding the negotiations, and independent of any final contract. The Company took the position that any raises which would be granted was an issue that was ''on the table,'' to be negotiated and addressed in a final contract.

The judge found, with subsequent Board approval (at 1094 and 1095)

> I find that once the Union was certified, the question of raises became a mandatory subject of bargaining. The duty to bargain collectively under Section 8(a)(5) of the Act is defined in Section 8(d) of the Act as the duty to ''meet . . . and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . .'' There is no evidence or allegation in this case that the Company failed to negotiate in good faith the matter of wage increases. What the Union wanted was a continuance of interim or past discretionary raises outside of the contract negotiations. The Union, in other words, wanted the best of both worlds, and under the facts of this case I find that the Company had no legal duty to comply with the Union's request. In this regard, I note the lack of any evidence or testimony in the record to indicate that previous wage increase patterns were acceptable by the Union's as future contract provisions on the subject. I thus find and conclude that the Company did not violate Section 8(a)(1) of the Act as alleged in paragraphs 11 and 14 of the complaint. [Fn. omitted.]

Here, the record reveals that the Union was certified as the representative of certain of Respondent's employees on November 4, 1991. In its original contract proposal submitted in early January 1992, the Union proposed that all employees in the bargaining unit except the batch plant weigh master and dispatcher receive stated hourly wages and certain described fringe benefits. The parties thereafter agreed to negotiate noneconomic issues first, and negotiations on economic items did not begin until late July 1992. In the meantime, Respondent, without discussing the situation with the Union, failed on or about June 1, 1992, to give employees a discretionary wage increase as it had during calendar years 1989, 1990, and 1991. When asked by the Union in August or September whether it was going to give the annual wage increases, Respondent indicated that as negotiations were ongoing, the issue of wage increases would be negotiated.

Noting that the Union in the instant case had presented Respondent with initial wage proposals which did not include proposed continuation of discretionary wage increases which had previously been conferred on July 1 of each year, I, in agreement with Respondent, conclude it would have violated Section 8(a)(1) and (5) of the Act if it had unilaterally granted employees a discretionary wage increase on July 1, 1992. I find the situation to be analogous to the situation which existed in *American Mirror Co*., supra, and conclude that General Counsel has failed to prove that Respondent violated Section 8(a)(1) and (5) of the Act by failing to grant unit employees a wage increase on or about July 1, 1992.

D. *The Alleged 8(a)(1) Violations*

The complaint alleges, in effect, that Respondent violated Section 8(a)(1) of the Act by blaming its refusal to grant annual wage increases in 1992 on the Union as Respondent's supervisors told employees they were not getting raises because of negotiations and/or because of the Union. General Counsel sought to prove the allegation through testimony given by employees Dennis Jackson, Harold Fraasman, William English, and David Hummeldorf.

Employee Jackson testified that at some point in July 1992 he asked Dave Gumz,[4] Respondent's plant manager, if he was going to evaluate people for their raises this year. He indicated Gumz told him he would let him know the following Monday, but when Monday came he had not found out anything. A couple days later, Jackson claims Gumz told him he was going to do evaluations, but his understanding was there would be no raise on account of the union and contract negotiations. Employee Fraasman testified that when Gumz explained his evaluation to him in September 1992, he told him the evaluation would not get him a raise because it was frozen because of the Union at the time. Similarly, employee English testified that, when Gumz gave him his 1992 evaluation, he told him ''all the wage raises were frozen because of the union contract.'' Finally, employee Hummeldorf testified that at a time he could not specify, Gumz told him things were on hold because of the Union.

When he appeared as a witness, David Gumz testified that basically everyone who worked under him asked about the wage increase in 1992. He indicated he, pursuant to advice from upper management, told them ''due to the negotiations with the union that all wages right now are frozen.''

Having found, supra, that Respondent did not violate Section 8(a)(1) and (5) of the Act by discontinuing its annual wage increase, I find it did not violate Section 8(a)(1) by telling employees, in effect, that wage increases would be handled in negotiations.

E. *The Referral Bonus*

Several years prior to the time the instant case was heard, Respondent promulgated a referral bonus policy which was placed in the record as Joint Exhibit 1. It provides:

> If an active employee refers an individual for employment with Harrison Ready Mix, and the individual is hired and remains actively employed for 1 year, on the first anniversary of the new employee, the sponsoring employee will receive a $500 bonus.

[4] David Gumz is referred to as David Gumms in the transcript, which is hereby corrected to reflect the individual's correct name.

The complaint alleges that Respondent violated Section 8(a)(1) and (3) of the Act about October 1992 by determining that employees Charles Whaley and Clifford Fulmer were not eligible for a $500 referral bonus because they had joined or assisted the Union. Additionally, it alleges that by unilaterally altering its referral bonus policy in October 1992, Respondent violated Section 8(a)(1) of the Act.

Employee Clifford Fulmer testified that in August 1991 he told his brother Ralph Fulmer that Respondent was hiring and he should contact JW (Jim Weitz) and get a job. Clifford claims that he then told JW that his brother was looking for a job, and he claims JW told him to have him come down and talk to him about going to work for him. In September 1992, Clifford Fulmer filed a complaint with his union steward which asserted that Respondent had failed to pay him a referral bonus for referring his brother Ralph to Respondent in August 1992 (G.C. Exh. 17). He had not raised the matter with any Respondent official before he filed the complaint. He stated he had not because he asked JW in April 1992 if the bonus plan was still in effect and JW said no.

Ralph Fulmer testified he had been a contractor for some 15 years before he was hired as a driver by Respondent. He acknowledged that Weitz was first a driver and then a salesman for Harrison during the period, and that he became acquainted with him as he came to jobs. Ralph claimed that before he applied for a job at Respondent in 1991, his brother Clifford told him they needed drivers and, although he had no license, that Respondent would train him. He testified Clifford told him to see JW about getting a job. Ralph testified he then telephoned Weitz about a job, mentioning during the discussion that his brother told him he needed drivers. He recalled Weitz acknowledged needing a driver and told him he would call when he wanted him to come in to see him. He recalled he was called to come in about a month later and claims that, during the interview, he once against told Weitz his brother had told him Respondent needed drivers and he should get hold of Weitz.

Mitchell Grubb worked for Respondent as a mechanic until he quit sometime in 1989. In April 1991, Grubb encountered Charles Whaley while Whaley was providing concrete for a pour at a store in New Trenton. After Grubb indicated he was unemployed, Whaley suggested he call Weitz at Respondent and inquire about a driving job. Grubb recalls that Whaley got on his truck radio to ask if Weitz was at the plant and that, upon learning he was, he informed the person to whom he was talking to stand by because someone was going to call him in a few minutes. Grubb testified that he went home after the radio conversation and called Weitz. During his conversation with Weitz, Grubb indicated he had talked to Whaley at the store and when he asked Whaley if they needed drivers, Whaley told him to call Weitz. Whaley described the situation which preceded Grubb's call to Weitz essentially as it was related by Grubb. Whaley testified that after he referred Grubb, at some point Respondent had three drivers he had referred and he stood to collect $1500 if they all stayed a year. He claims he and Weitz joked about the situation on several occasions and that one man he had referred went because he said something wrong on the radio, and then a second failed to last out a year for some reason. When Grubb's year was up, Whaley asked both Dave Gumz and Jim Weitz about getting the bonus for Grubb. They both told him they would let him know, and they subsequently told him Peggy Roudebush said he was not entitled to the money because Grubb was a prior employee.

Respondent defended its failure to give employees Cliff Fulmer and Charles Whaley referral bonuses through testimony given by J. Weitz, Linda Platt, its human resources manager, and Peggy Roudebush.

Weitz denied that either of the Fulmer brothers told him, at the time Ralph Fulmer was interviewed and hired, that Cliff had referred Ralph to Respondent. Weitz testified he had known Ralph since 1979, and that the conversation leading to Ralph's filing of an application was one wherein Ralph called him to indicate he had experienced a falling out with a partner and needed a job. He claims he told Ralph to come in and file an application, and when Ralph did that, he hired him. He testified that, after Ralph was hired, Cliff did not inquire about a referral bonus for referring Ralph to employment at Respondent. With respect to Whaley's referral of driver Grubb, Weitz acknowledged that he knew there had been some discussion between Whaley and Grubb on a job near Grubb's home before Grubb called to inquire about employment. Additionally, he acknowledged that shortly before Grubb had been employed as a driver for a year, Whaley asked him if he was going to receive a referral bonus for referring Grubb to Respondent. Weitz claimed he told Whaley he would check, but someone other than himself thereafter told Whaley he would not receive the bonus. Asked if he told Whaley he though it was unfair that he was not given the bonus, he evaded the inquiry. Similarly, when asked if he had joked with Whaley about the employee being entitled to $1500 if three persons remained employed by Respondent for a year, he equivocated.

Platt indicated during her testimony that she administers Respondent's bonus program and she is the person who authorized payment of the bonus to employees. She stated applicants normally came to her to obtain and complete applications for employment and, if they have been referred by a current employee, they normally tell her. She observed that the application Respondent is using at the present time asks who the application was referred by. Platt recalled that, when Grubb applied, he mentioned that he had run into Whaley and he told him they were hiring. She also indicated that when Steve Veil applied, she noted on his application ''Friend of Ralph Donathon,'' because Viel told her Donathon had told him to be sure he told her he had referred him. Platt testified she did not believe Cliff Fulmer told her he was entitled to a referral bonus after Ralph's year was up. She noted that Ralph Fulmer's application said nothing about him being referred by anyone. She indicated that during the last year and a half, no referral bonus had been paid to any employee who referred a former employee to work at Respondent. She recalled that one referral bonus had been paid to an employee although the individual referred did not mention the referral when he came in. The individual referred was Jim Huff and she learned within 4–6 weeks after he was hired that Rick Ramey had referred him. When the referral was confirmed by several people, Ramey received the bonus when Huff completed his year of employment. Platt testified that when an applicant tells her he was referred by an employee, she places the information on a list she maintains.

Peggy Roudebush explained during her testimony that she originally conceived the referral bonus policy and caused it to be effectuated. She indicated that the policy was instituted

to cause employees to refer new employees for employment. When the Whaley-Grubb situation arose, Roudebush testified she decided the referral bonus policy did not apply to referral of a former employee because the policy specifically states it applies to the referral of a ''new'' employee.

As indicated, supra, Respondent's written referral policy provides that an employee who refers a person for employment will received a $500 bonus ''on the first anniversary of the *new employee*.'' (Emphasis added.) Here, General Counsel contends that Respondent changed its referral policy by deciding it was not applicable to rehires to enable it to deny employee Whaley a bonus because he was a known union activist. In making the contention, General Counsel offered no evidence which would reveal that Respondent harbored antiunion animus, or evidence which would show that it had an intention to punish Whaley or any other employee because they joined or supported the Union. I find Respondent's interpretation of its referral policy to be a reasonable interpretation. Accordingly, I find that General Counsel has failed to prove that Respondent refused to give employee Whaley a referral bonus for referring employee Grubb for discriminatory reasons. Additionally, I find that General Counsel failed to prove that Respondent altered its referral policy without consulting the Union in violation of Section 8(a)(5) as alleged.

Patently, the Fulmer situation poses a credibility issue which must be resolved. Clifford and his brother Ralph claim they both told Weitz that Clifford was referring Ralph for employment. Weitz and Platt both claim that Ralph merely made reference to the loss of previous employment and failed to mention Clifford at the time of his hire. Careful consideration of the matter causes me to credit Respondent's witnesses rather than the employees. First, I note that the evidence offered by General Counsel in an attempt to establish that Respondent was aware of Clifford Fulmer's prounion sentiments is very weak. That evidence is merely testimonial evidence which is to the effect that Clifford demonstrated his pleasure in the company office when the Union won the election. Significantly, no evidence was offered to show that any particular Respondent official noticed or commented on Clifford's actions on election day. Second, Clifford admitted during his testimony that prior to the time his brother had worked for Respondent for a year, he asked Weitz if the bonus was still in effect on an occasion when a buddy of his was looking for work. He claims Weitz told him he thought they had done away with it, and that caused him to fail to ask for his bonus when Ralph completed his first year of employment. The uncertainty exhibited by Clifford on the occasion described is inconsistent with his claim that he and Ralph took great pains to establish his right to a referral bonus at the time of Ralph's hire. Finally, Weitz and Platt were impressive witnesses, while the Fulmer brothers were not.

In sum, the evidence offered by General Counsel fails to convince me that Respondent harbored ill will against employee Clifford Fulmer because he was a union advocate. I credit the testimony given by Weitz and Platt which would lead one to believe that Ralph Fulmer obtained employment at Respondent without the assistance of his brother Clifford. Accordingly, I find that General Counsel failed to prove that Clifford Fulmer was denied a referral bonus because he joined or supported the Union.[5]

F. *The January 3, 1993 Wage Increase*

On December 23, 1992, Respondent's employees were given the following memoranda with their paychecks (G.C. Exh. 5):

> TO:
> FROM: Bud and Peggy Roudebush
>
> As you probably know, due to unfair labor practice charges and a decertification petition currently pending before the National Labor Relations Board, it may be a while before contract negotiations with the Union resume.
>
> The Company is concerned and it assumes the Union is also, about the length of time without a wage increase which could occur under the circumstances. Accordingly, effective January 3, 1993, there will be a 2% across-the board increase for all employees in the bargaining unit.
>
> Additionally, where applicable, all drivers who have been employed for at least one year but less than two years shall have their hourly rate raised to $9.00 per hour; all drivers who have been employed for at least two years but less than three years shall have their hourly rate raised to $10.00 per hour; and all drivers who have been employed for three years or more shall have their hourly rate raised to $10.50 per hour.
>
> Your new rate, effective January 3, 1993, is _____.

Respondent admits in its brief (p. 14) that the wage increase implemented on January 3 was ''something less than what was agreed to on October 15.'' It seeks to establish that the increase was lawfully conferred because: (1) it offered to negotiate the increase with the Union and the Union refused to negotiate; and (2) the wage increase was conferred after the parties had reached an impasse in negotiations. The complaint alleges that by giving employees the January 3, 1993 pay raise, Respondent violated Section 8(a)(1) and (5) of the Act.

Respondent failed to establish that the parties were at impasse on January 3, 1993. Thus, union spokesman, Moses, credibly testified that the Union made a package proposal to Respondent on October 15, 1992, with the understanding that Respondent accepted all proposals in the package or none were to be deemed to be accepted. It is undisputed that Respondent did not accept the package proposal which covered issues such as wages, performance bonuses, insurance, retirement, tool allowance and part-time employees, training pay, and union security and dues checkoff because it was opposed to union security. While the record reveals the parties may have reached tentative agreement on some of the issues de-

[5] I have considered General Counsel's claim that employee Donathon, allegedly known by Respodnent to be antiunion, was treated favorably because of his sentiments when he was given a referral bonus for referring Steve Viel for employment. While the record reveals employees knew Donathon was antiunion, it fails to reveal that any Respondent official was aware of Donathon's sentiments. Indeed, Platt, who placed Donathan's name on her list of employees entitled to a referral, denied she was then aware of Donathon's sentiments.

scribed, it fails to reveal what the areas of agreement were and when they were reached. Indeed, the sole witness offered by Respondent to describe the negotiations was James Wheeler. While Wheeler did not exhibit excellent recall, he testified he thought the parties reached agreement on wages at the October 15 negotiating session; that they were still talking about insurance at the session. He testified in conclusionary fashion, without providing details, that outstanding issues after the October 15, 1992 negotiation session were union security and checkoff. Wheeler acknowledged that no serious negotiations occurred at the last negotiation session held prior to January 3, 1993—the November 19, 1992 session—as the parties then engaged in primarily in discussion of the decertification petition filed by a Respondent employee on November 16, 1992 (Case 9–RD–1668), and the blocking charge filed in Case 9–CA–30093. In sum, in the absence of documents to which negotiators Moses and Fischer signed off on to indicate their agreement on the issues which remained as of October 15, 1992, I find that Respondent failed to establish that an impasse in negotiations existed on January 3, 1993.

Similarly, I find no merit in Respondent's claim that the Union was given notice of its intention to grant employees a wage increase, but it failed to seek bargaining concerning the matter. Even assuming arguendo that the parties were at impasse as of January 3, 1993, the Respondent would have been free to implement only its last offer to the Union. *Fidelity Printing Co*., 299 NLRB 958 (1990).

For the reasons stated, I find that by awarding employees a wage increase not offered to the Union during bargaining, Respondent, on January 3, 1993, violated Section 8(a)(1) and (5) of the Act.

G. *Respondent's Alleged Refusal to Bargain Since December 17, 1992*

I have found, supra, that the parties held negotiating sessions on October 15 and November 19, 1992. Additionally, I have found, contrary to Respondent's contention, that the parties were not shown to have been at impasse on November 19, 1992, and/or on January 3, 1993. The record reveals that by letter dated December 10, 1992, Respondent informed the Union it saw ''no purpose in meeting at this time'' as it had not changed its position on union security (G.C. Exh. 12). While the record reveals the parties eventually reached agreement and executed a contract in mid-1993, it fails to reveal when they next met after November 19, 1992. By failing and refusing to meet with the Union during times when the parties were not at impasse, I find, as alleged, that Respondent violated Section 8(a)(1) and (5) of the Act.

H. *The Alleged Unlawful Suspension and Discharge of Employee Charles Whaley*

Charles Whaley was hired by Respondent as a truckdriver on March 3, 1983. From 1983 until 1990 or 1991, he trained drivers for Respondent on occasion and for a time he was the employee who qualified drivers so they could obtain DOT approval. He testified his attendance record was excellent for the first 9 years of his employment, and he indicated his evaluations were high until 1992. Whaley admitted his wife left him on the day the election was held at Respondent's facility and he indicated that caused him to attempt suicide in December 1991 or January 1992, and he spent 5 days in the hospital. Thereafter, he claims that medication and his personal problems interfered with his sleep. As a result, he built up a lateness record at Respondent and received numerous warnings. At one point, he had accumulated 10 points pursuant to Respondent's progressive disciplinary system and accumulation of more than 10 points subjected a driver to discharge. Whaley received favorable ratings each year through 1991, and he was one of five drivers who received the highest rate (6 percent) given to drivers in 1991. He was rated poorly in 1992 and protested by refusing to sign his rating form. (See C.P. Exh. 3.)

The Union won representational rights at Respondent at about the same time Whaley's personal problems started. He was the Union's observer at the November 1991 election, he served as a union steward thereafter, and he served with employee Johnson and Union Representative Moses on the Union's negotiating team. Additionally, the record reveals Whaley actively supported the Teamsters when they represented Respondent's employees. Respondent admits it was fully aware of Whaley's union sentiments and union activities.

While General Counsel successfully established that Whaley engaged in extensive union activity and that Respondent was aware of his participation in protected conduct, his proof of antiunion animus is extremely limited. That evidence was established through the testimony of Peggy Roudebush and employee Willard Woolums.

When called as a witness by General Counsel, Peggy Roudebush was asked if Respondent was opposed to unionization of its operators. She responded by stating she did not think they ever encouraged unionization and identified that portion of Respondent's employee handbook which contains the Company's position on unions, stating as follows (G.C. Exh. 2, p. 283):

> *A WORD ABOUT UNIONS*
>
> We believe that a team performs best when its members work together as a unit to achieve its goals. We feel that direct, face-to-face dealings with your coworkers and with any level of management are more beneficial than paying a union to speak for you.
>
> We are firmly committed to giving individual attention to your needs and concerns, face-to-face rather than through an outside third party. We want to hear from you and to speak directly to you. We will do everything morally and legally permissible to continue our practice of dealing directly with our employees.
>
> We believe that your interests, as well as our mutual goal to provide the best service to our customers, will be best served in this manner. Working together directly as a team will help to ensure the success and growth of our organization. This is the best insurance you can have for job security and good wages and benefits.

Peggy Roudebush was then asked if Respondent was opposed to organization of its operations by the Teamsters in 1989 or 1990, and she answered ''[Y]es, sir.''

Willard Woolums, a driver, testified that in the spring or early summer of 1992, his first year at Respondent, Dave

Gumz approached him and employee Bill English while they were sweeping and they asked him ''what the big push is on the 'union' . . . why some of the top guys was feeling the need of the union.'' Woolums recalled that Gumz responded by saying ''well for some of them if the union doesn't come in, they're not going to have a job.'' Woolums testified that later, on the same Saturday, he overheard the following conversation between Dave Gumz and Jim Griebel (Tr. 224):

> How the conversation got started, I don't know. But it was something to the effect that Dave was saying the new guys are asking about the union, and Jim said don't worry about it. This will drag out long enough, it'll lose its momentum and it will be over.

At 4:30 p.m. on January 19, 1992, Whaley was driving his empty cement truck north on I-75 approaching I-74 North. Traffic was stop and go and he proceeded down the ramp to I-74. As he approached a turn, the cars in front of him stopped. The pavement was irregular and he ascertained he would be unable to stop before he collided with the car in front of him. He elected to steer for the guard rail. After striking it, his truck turned around and rallied over. He was cited for failure to have his vehicle under control. (See C.P. Exh. 3.) He injured a leg in the accident but refused immediate medical treatment. He was suspended by Jim Griebel. During his suspension, Whaley was required to take a drug test, which he passed. Additionally, he was asked to submit to interview by a private investigator hired by Respondent to investigate his accident. He claimed he had not known Respondent to hire a private investigator prior to that time. On February 3, 1993, Whaley was called to Peggy Roudebush's office where he was fired. He recalls Peggy Roudebush told him they had gone back over the records for the last 10 years and anybody that had turned over a truck on the highway had been terminated. Peggy Roudebush informed the employee she had brought in an investigator to get all the facts and the investigator said he was at fault and that was her reason for terminating him. At the time of his termination, Whaley was given a termination letter signed by Respondent Vice President Jim Griebel. The body of the letter states (G.C. Exh. 18):

> This letter is to verify that as of February 2, 1993, your employment with Harrison Ready Mix is terminated.
>
> On January 19, 1993, you turned over the concrete mixer truck you were driving on the expressway at the I-75 and I-74 interchange. You were cited by a Cincinnati policeman for ''failure to control'' the vehicle. An independent accident investigator agreed with the police report that you were at fault in the accident.
>
> The Company has consistently terminated drivers whose trucks have turned over on a street or highway as a result of the driver's negligence, which is what occurred in your accident on January 19. Moreover, you have a history of being involved in accidents, and you currently have 8-1/2 disciplinary action points accumulated. After carefully considering all of these factors, it was determined that the termination of your employment is warranted and in the best interest of the Company.
>
> Your health and life insurance benefits are paid through February 28, 1993. You will be notified by certified mail as to your insurance rights under COBRA. You will be eligible to receive the money from your 401-K Plan following the June, 1993, evaluation of the Plan.

During his testimony, Whaley claimed that several drivers experienced accidents during his time at the Company and they were not fired. He recalled that driver James Combs rear-ended a car on John Grey Road and was not suspended while waiting for drug test results and never missed a minute of work although he was cited in the accident. Additionally, he vaguely described a situation wherein driver Adams, the Respondent's observer in the election, had been involved in an accident, but was still employed at the time of the hearing. Similarly, Harold Fraasman testified that at some time in 1992, he missed a turn, backed up and hit a car which had a lady and a child in it. He indicated his punishment was merely that he was required to attend a meeting as there was no damage to the truck.

Respondent defended its decision to terminate Whaley through testimony given by Peggy Roudebush. She indicated that she assumed the responsibility for determining Whaley's fate because he was known to be active with the Union and Respondent anticipated the filing of an unfair labor practice charge if Whaley was disciplined. Peggy Roudebush claimed she commenced her consideration of the Whaley incident by obtaining his personnel file and by telling her human resources manager, Linda Platt, to check the files back for a reasonable time to ascertain what trucks had been turned over on public thoroughfares, and what had happened to the drivers. She testified Platt supplied her with the files of former drivers Eugene Brabson and Ken Whiteman. Brabson lost control of his cement truck and turned it over on a public street on September 30, 1981. While no one was injured in the accident, Brabson was terminated for losing control of his vehicle and turning it over. While Peggy Roudebush did not personally terminate Brabson, she testified that when Ken Whiteman lost control of his truck and turned it over on a public street in 1986, she made the decision to terminate him because of the accident. Peggy Roudebush claimed that Respondent deals severely with drivers who, through their own negligence, turn cement trucks over on public thoroughfares because such accidents expose Respondent to tremendous possible liability. Peggy Roudebush testified that while she reviewed Whaley's personnel file and noted that he had experienced other accidents, and that he had amassed 10 points because of absenteeism and/or lateness at one point, that she viewed his personnel file to see if there was anything in it that should cause her to refrain from terminating Whaley. She said she concluded there was not. When she was asked why she decided to terminate Whaley, she replied:

> I decided to terminate Mr. Whaley as a result of the fact that he had been found to be negligent in the operation of his vehicle at a public thoroughfare, resulting in the overturning of his vehicle.

When he appeared as a witness, David Gumz, Respondent's plant manager, testified that he could not recall any conversations with Bill English or Willard Woolums regarding the Union. Additionally, he testified he did not know of

plans by the Company to terminate the older employees if the Union went away. I credit employee Woolums.

James Griebel, Respondent's vice president, indicated during his testimony that he, Jim Wheeler, and Linda Platt share the responsibility for investigating accidents involving company drivers. He testified that, after they investigate an accident, they meet with the driver on how to prevent it in the future. He stated disciplinary action is usually taken when there is gross neglect involved. Griebel recalled that driver James Combs was involved in a rear-end collision 3 or 4 years ago. After the investigation of the accident was completed, Griebel recalls that they merely met with Combs on how to avoid accidents in the future. He was not disciplined further, but the accident went into his file. Griebel testified he also investigated the accident experienced by driver Harold Fraasman during which Fraasman missed a turn-off, backed up to turn on the street, and backed into a car. As was the case with Combs, Griebel testified they met with Fraasman, reviewed the accident with him, and put it into his file for future reference.

Conclusions

The evidentiary burden of the parties is set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), where the Board stated (at 1089):

> First, we shall require that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a ''motivating factor'' in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of protected conduct.

Careful review of the record causes me to conclude that General Counsel has not made a prima facie showing sufficient to support an inference that employee Whaley's participation in protected conduct was a ''motivating factor'' in Respondent's decision to terminate him. While General Counsel seeks in his brief (p. 14) to make much of Roudebush's admission that Respondent opposed the Teamsters during their 1989 or 1990 organization campaign, and he interprets Gumz' ambiguous remarks to employees Woolums and English to be an acknowledgment that Respondent intended to rid itself of Whaley and other employees if the Union failed to negotiate a contract, the instant record is essentially devoid of evidence which would show that Respondent possesses marked antiunion animus. Moreover, even though it is apparent that employee Whaley has been a union adherent throughout much, if not most, of his employment at Respondent, it certainly appears that until he started to experience personal problems around the time the current Union was voted in, he was treated favorably by Respondent. Illustrative is that testimony which reveals he was asked to instruct and qualify other drivers during the first 9 years of his employment, and Charging Party's Exhibit 1, which reveals he was rated highly as late as July 1, 1991.

In a case such as this, one would expect General Counsel to prove discriminatory intent by showing that the alleged discriminatee was treated disparately. Here, General Counsel was unable to make such a showing as former employees who turned their trucks over while operating them on a public thoroughfare from 1981 through the date of Whaley's accident were terminated. Indeed, General Counsel established that during the same time span, Peggy Roudebush also terminated a driver who turned his cement truck over while on other than a public thoroughfare. (See G.C. Exh. 4 (driver Fulmer).)

In sum, the instant record contains insufficient evidence to show that the Respondent possesses marked antiunion animus, and it contains no direct evidence which would reveal it intended at any time to terminate Charles Whaley because he engaged in protected activity. To the contrary, the record reveals employee Whaley was well treated by Respondent, even during periods when he was experiencing personal difficulties which interfered with his job performance. The record fails to reveal that employee Whaley was treated in disparate fashion when he was terminated for overturning a cement truck due to negligent driving while he was on a public thoroughfare. Instead, the evidence reveals that other drivers who experienced similar accidents were also terminated. For the reasons stated, I find that General Counsel failed to prove that employee Charles Whaley was terminated in violation of Section 8(a)(1) and (3) of the Act.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following constitutes a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

> All truck drivers, vehicle maintenance employees and batch plant employees employed by (Respondent) at its Harrison, Ohio facility, excluding all office clerical employees and professional employees, guards and supervisors as defined in the Act.

4. At all times material, the Union has been the exclusive representative for purposes of collective bargaining of the employees in the above-described appropriate unit.

5. By unilaterally increasing its employees wages in amounts not offered to the Union during negotiations, at a time when the parties were not at impasse in their negotiations and by refusing to negotiate with the Union during times when no impasse in negotiations existed, Respondent violated Section 8(a)(1) and (5) of the Act.

6. The unfair labor practices recited above have a close, intimate, and substantial effect on the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

I shall order the Respondent, if requested by the Union, to reinstate the wages and terms and conditions of employment that existed before its unlawful changes. To the extent that the unlawful unilateral changes implemented by Respondent may have improved the terms and conditions of

employment of unit employees, I note that no provision of my recommended Order shall in any way be construed as requiring the Respondent to revoke such improvements.

[Recommended Order omitted from publication.]